86-165

No. _____

Supreme Court, U.S.
FILED
AUG 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HARRIET BROOKS AND JEROME MCNAIR,
Petitioners,

v.

CHRYSLER CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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40 pp

QUESTION PRESENTED

Should this Court, in its supervisory capacity over Federal Rules, review and set standards for the procedure to be utilized under two of the most important of the Federal Rules of Evidence, where it appears that the lower federal courts are ignoring the requirements of those Rules?

Rule 403 (which permits the District Judge to exclude evidence even though it is relevant), and Rule 703 (which permits an expert to base an opinion on facts or data not admissible in evidence), both require basic determinations by the trial judge, not by the Court of Appeals. In this case, following a pattern which has become common in the lower federal courts, the Court of Appeals (1) expressly noted that the District Judge "did not articulate his specific reasons for excluding" plaintiffs' entire case, under Rule 403, but then made its own findings under that Rule, and (2) sustained the District Judge's prohibition of plaintiffs' expert under Rule 703 without the required inquiry by the Judge as to whether the inadmissible evidence on which the expert would have relied was of the type sanctioned by the Rule.

This case presents the issue noted in Rule 17.1(a) of this Court: that "a federal court of appeals...has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

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HARRIET BROOKS AND JEROME MCNAIR,
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CHRYSLER CORPORATION,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Harriet Brooks and Jerome McNair, petitioners, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is reported at 786 F.2d 1191. It is reprinted in Appendix A hereto, pp. A1-17.

JURISDICTION

The decision of the Court of Appeals was issued on March 28, 1986. A timely petition for rehearing and suggestion for rehearing en banc was denied on May 9, 1986. The jurisdiction of this Court to review the decision below is invoked pursuant to 28 U.S.C. 1254 (1).

RULES INVOLVED

This case involves the two following Rules of the Federal Rules of Evidence:

Rule 403.

EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 703

BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

STATEMENT OF THE CASE

This was an automobile accident case, based on diversity of citizenship jurisdiction, in which the two occupants of a 1979 Chrysler LeBaron were injured on July 16, 1982 (one of them later dying from her injuries) when the automobile pulled abruptly to the right and crashed into a telephone pole. The claim of the plaintiffs was that the accident was caused by "brake piston seizure" of the right front wheel. Brake piston seizure occurs when the driver of a vehicle steps on the foot brake and then releases the brake pedal, but the piston remains in contact with the wheel rotor preventing the wheel from turning. If the other wheel is

turning freely, the car will pull in the direction of the locked wheel. Examination of the wrecked vehicle showed that this was the situation here.

It was the theory of the plaintiffs that the alleged brake piston seizure in this 1979 LeBaron resulted from defective design of the disc brakes in that car. Plaintiffs contended that the design of the "dust boot" (a protective device) in the braking system of this automobile was such that it permitted corrosion build-up within the piston bore, which prevented the brake from disengaging properly.

The National Highway Traffic Safety Administration (NHTSA) had conducted an investigation from 1978 to 1980 into the subject of brake piston seizure in these very Chrysler disc brakes, focusing attention on the persistent recurrence of corrosion build-up within the piston bore. Numerous consumer complaints of loss of vehicle control were received by NHTSA, indicating brake drag or seizure on one wheel or the other. Correspondence between NHTSA and Chrysler engineers revealed that Chrysler was not only aware of the piston seizure problem but had initiated design changes to the "dust boot" in 1978 and 1979 to attempt to eliminate the corrosion problem (caused by the intrusion of water and foreign matter into the piston bore) which was the cause of piston seizure.

Five exhibits were prepared by plaintiffs, on the basis of the NHTSA investigation, and these five exhibits were virtually the plaintiffs' entire case, to be supplemented by the testimony of plaintiffs' engineering expert, Dr. James A. Kirk. The purpose of the exhibits was to show prior occurrence of brake piston seizure in Chrysler automobiles (including the 1979 LeBaron) under "substantially similar circumstances," a well-established ground for proving a design defect. The purpose of the exhibits was also to show that Chrysler knew about the design defect but failed to warn customers or to correct the defect. The five exhibits, which plaintiffs intended to present to the jury, were Exhibits 16A, 16B, 17, 26, and 34.

Exhibit 16A was comprised of public records obtained from NHTSA files, consisting of correspondence between NHTSA and Chrysler concerning the problem of brake piston seizure, Exhibit 16B, also a public record, consisted of two internal memoranda written by Ken Rice, a NHTSA Safety Defects

engineer who had conferred with Chrysler and had reviewed the file; one of those memoranda identified corrosion as the cause of the problem, and the other memorandum noted that no problems had been cited following the redisign of the piston by Chrysler.

Exhibit 17 consisted of 333 owner complaints, mainly in the form of responses to questionnaires that NHTSA had sent out to Chrysler automobile owners during the NHTSA investigation. Exhibit 34 consisted of 98 of these questionnaire responses selected from exhibit 17 by plaintiffs' expert, Dr. Kirk, who would have testified, if permitted, that within reasonable engineering certainty Exhibit 34 contained substantially similar occurrences of the very problem which caused the crash of the automobile involved in the case at bar.

Finally, there was Exhibit 26, a collection of documents from Chrysler's own file. Plaintiffs contended that these documents revealed Chrysler's long-standing knowledge of the piston seizure condition due to corrosive build-up which Chrysler's own engineers had long since concluded was due to a "basic design problem" in the dust boot.

Chrysler, which had maintained that the corrosion problem was not a "design problem" but was simply an "installation problem," moved *in limine* to exclude all five exhibits. Chrysler argued that the jury would be confused by the nature of the NHTSA inquiry and the statements of Chrysler employees relating to the piston seizure condition in Chrysler's disc brakes; it argued that the five exhibits were inadmissible hearsay; it argued that the prior occurrence had not been shown to be "substantially similar;" it argued that even if they were substantially similar, the evidence was inadmissible under Evidence Rule 403 because their probative value was substantially outweighed by the risk of undue prejudice.

The District Judge excluded all five exhibits, thus effectively destroying plaintiffs' case. He did not state the basis or bases for his ruling; indeed, the Court of Appeals specifically noted, 786 F. 2d at p. 1193 (p. A-4, infra), fn. 2:

> The district judge did not articulate his specific reasons for excluding these exhibits, noting generally that he concurred in Chrysler's position.

And then the District Judge, again without articulating a reason, ruled that plaintiffs' engineering expert could not rely upon Exhibits 16A, 16B, or 26, which were to be the heart of the expert's testimony. The Judge did not explain his ruling but simply referred to his earlier ruling that the exhibits themselves were inadmissible; he made no reference to Evidence Rule 703, which permits an expert to rely upon "facts or data . . . not . . . admissible in evidence," if "of a type reasonably relied upon by experts in the particular field."

That was the end of any case the plaintiffs could present, and consequently a directed verdict was entered in favor of defendant Chrysler.

On appeal, in the decision involved here, the Court of Appeals in a lengthy opinion sustained the District Judge by reciting, in detail, reasons to support the District Judge's decision. In effect, the Court of Appeals did the job the District Judge, as the baseline judge, should have done. The Court of Appeals analyzed the proffered evidence, argued the Rule 403 factors of "unfair prejudice, confusion of the issues, or misleading the jury, waste of time," etc., and then said, 786 F. 2d at 1198-9, p. A-16, infra:

> We therefore conclude that the district judge properly concluded that the minimum probative value of these exhibits was substantially outweighed by the risk of unfair prejudice, trial delay, and jury confusion, and that he therefore did not abuse his discretion in excluding these exhibits under Rule 403.

As to the District Judge's ruling prohibiting plaintiffs' expert from relying on the excluded exhibits, the Court of Appeals (erroneously citing Evidence Rule 702 instead of 703) merely said, 786 F. 2d at 1199, p. A-17, infra, that the plaintiffs' contention that this was improper was "without merit," adding that "the district judge made clear that the scope of Dr. Kirk's testimony was still open to reconsideration when Dr. Kirk was examined on *voir dire*." This quoted statement was absolutely incorrect, as the Court's record citation (App. 986) demonstrates, because all that the District Judge offered to do there was to "take another look at Dr. Kirk's" with regard to "the question of these questionnaires as far as these five people were concerned." This was a reference to Exhibit 34, a selection of consumer complaint questionnaires. *The District Judge never offered to reconsider the matter of the Chrysler and NHTSA documents* (Exhibits 16A, 16B, 26), which were the heart of plaintiffs' case.

REASONS FOR GRANTING THE WRIT

This case presents a problem contemplated in the Court's Rule 17.1(a) — the need to exercise the Court's "power of supervision" in order to clarify and mandate the procedure in which the lower federal courts are to administer important rules of the Federal Rules of Evidence. The Court of Appeals here sanctioned "a departure" from the proper functioning of Rule 403 and Rule 703, and indeed it appears to be common practice among the Courts of Appeals to do just what the Court below did — that is, to bail out the District Judge by making the detailed findings that only the trial judge can make.

The role of this Court in interpreting Federal Rules for proper administration by the lower courts is long established. Perhaps the best-known example is that of *Hanna v. Plumer*, 380 U.S. 460 (1965), involving one of the Federal Rules of Civil Procedure. This Court specifically stated (p. 463) that it granted certiorari "[b]ecause of the threat to the goal of uniformity of federal procedure posed by the decision below." Well-known also in this regard is the decision in *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), in which the Court said, p. 109: "We granted certiorari to review undecided questions concerning the validity and construction of rule 35" [of the Federal Rules of Civil Procedure]. See also *Upshaw v. United States*. 335 U.S. 410 (1948), involving the interpretation of Rule 5(a) of the Federal Rules of Criminal Procedure, and of course the towering opinion of the Court in *Hickman v. Taylor*, 329 U.S. 495, 497 (1947): "This case presents an important problem under the Federal Rules of Civil Procedure..." And see *Delta Airlines, Inc. v. August*, 450 U.S. 346 (1981), interpreting Civil Rule 68.

We cite also some of the Court's decisions involving the class suit rule, Rule 23, F.R. Civ. P., such as *Snyder v. Harris*, 394 U.S. 332 (1969), *Zahn v. Int. Paper Co.*, 414 U.S. 291 (1973), and *Eisen v. Carlisle and Jacqueline*, 417 U.S. 156 (1974). And finally, to come to the most recent such decisions, this Court on June 25 of this year issued two decisions laying down, for the lower federal courts, the proper administration of the summary judgment rule, Rule 56, F.R. Civ. P. — see *Celotex Corp. v. Catrett*, No. 85-198, and *Anderson v. Liberty Lobby, Inc.*, No. 84-1602.

Only eight months ago this Court granted certiorari to review the question whether a Court of Appeals could exercise its own supervisory powers to establish a rule of procedure for governing the management of litigation (failure to file timely objections to magistrate's report waives right to appeal to Court of Appeals). *Thomas v. Arn,* _____ U.S. _____ (December 4, 1985), 88 L. Ed. 2d 435. The sole issue was one of supervision of rules of procedure.

The Federal Rules of Evidence, although they came into existence as an Act of Congress and not as originally promulgated by this Court (P.L. 93-595, Jan. 2, 1975), have essentially been committed to the supervisory authority of the Court, see 28 U.S.C. 2072, equally with the Civil Rules and the Criminal Rules. If the lower federal courts are erroneously administering those Rules, it is the function of this Court to lay down the proper interpretation. Indeed, with respect to one of the very Rules involved in this case, Evidence Rule 403, it may be said that the Court has already, to some extent, done this. See *United States v. Abel.* 469 U.S. 38, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984).

1. Rule 403

Rule 403 provides that evidence, although relevant,

> may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

This rule was adopted by Congress without change from the Rules promulgated by the Court itself, and thus the Advisory Committee's Note to those promulgated Rules stands without qualification. 10 *Moore's Federal Practice* (1985) p. IV-66. That Note points out that Rule 403 hinges on "balancing" the need for the evidence against the possible harm caused by its admission. *Id.,* p. IV-67. Our point here is that this "balancing" function must be performed by the District Judge, who is the person on the scene, not by an appellate court removed from the action. Rule 403 "calls for the *trial court* to exercise its discretion" when performing the balancing function. (Emphasis added) *Id.,* p. IV-73.

A number of courts have certainly emphasized this. The First Circuit said, in 1975, that this balancing test "is committed primarily to the trial court." *United States v. Eatherton,* 519 F. 2d 603, 611. The Ninth Circuit said in 1975 that this function "is committed to the discretion of the trial court." *United States v. Hobson,* 519 F. 2d 765, 771. The Fourth Circuit said in 1982 that it is "solely entrusted to the discretion of the trial court." *United States v. MacDonald,* 688 F. 2d 224, 237, cert. den. 459 U.S. 1103.

This Court itself has said precisely the same thing. "...weighing any factors counseling against admissibility is a matter first for the district court's sound judgment under [Rule] 403..." *United States v. Abel,* 83 L. Ed. 2d at 459.

It is manifest that the Court of Appeals in this case did not abide by the mandate of Rule 403 that the *trial judge* make the on-the-spot decisions required under the Rule. As the Court below candidly noted, 786 F. 2d 1191 at 1193 (p. A-4, infra), n.2:

> The district judge did not articulate his specific reasons for excluding these exhibits, noting generally that he concurred in Chrysler's position.

But "noting generally" that the trial judge "concurred" in one party's position is insufficient under the Rule. It is no secret that a party will generally make every objection that the mind of man can conceive, including surely some of those contained in Rule 403. "Noting generally" does not specify which of those objections were sustained by the judge; certainly it is unlikely that he agreed with all of them. It is improper, it is maladministration of that Rule, for the appellate court to do what it did here — to bail out the District Judge by making its own assessment of Rule 403 factors, picking and choosing its own views, and then saying (786 F. 2d at 1198-9, p. A-16, infra):

> We therefore conclude that the district judge properly concluded that the minimum probative value of these exhibits was substantially outweighed by the risk of unfair prejudice, trial delay, and jury confusion and that he therefore did not abuse his discretion in excluding these exhibits under Rule 403.

It is not that the Court of Appeals below was ignorant of the requirements of Rule 403. Ten years ago, in *United States v. Robinson,* 530 F. 2d 1076, 1081 (D.C. Cir. 1976), this same Court said:

> ...what is required of the judge is a balancing of the probative value of and need for the evidence against the prejudicial impact.

And then, after saying that a judge may make merely a "conclusory comment" or other such statement, the Court continued:

> To avoid the possibility that confusion may lurk in such labeling and shorthand it would be preferable to confront the problem explicitly, acknowledging and weighing both the prejudice and the probative worth of impeachment in the spirit of balancing stressed in the newly effective Federal Rules.

It is an open secret that many federal appellate courts are, despite protestations to the contrary, doing exactly what the court below did here; they are permitting District Judges to exclude relevant evidence without making specific Rule 403 judgements. If certiorari is granted, we will analyze the cases to demonstrate that this is so. And if that is true, it is time for this Court to require the Courts of Appeals to hold the District Judges to the job required of them by Rule 403.

It was particularly cruel, in the case at bar, for the Court of Appeals to sustain — on this improper basis — the exclusion of *the totality* of plaintiffs' proffered exhibits, the heart and soul of plaintiffs' case, while at the same time paying lip service (786 F. 2d at 1198, p. A-15, infra) to the fundamental proposition that the "Federal Rules of Evidence generally favor the admissibility of relevant evidence, leaving it to the parties to argue the weight that should be given that evidence..."

2. Rule 703

Rule 703 of the Federal Rules of Evidence reads as follows:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

The District Judge in this case, after excluding all of plaintiffs' proffered exhibits, then ruled cryptically that plaintiffs' engineering expert, Dr. James A. Kirk, could not rely upon those exhibits.[1] The Judge not only did not explain his ruling; he obviously did not make any inquiry whether the excluded exhibits were "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject," under Rule 703. Apparently he believed that if the underlying exhibits were inadmissible, the expert could not rely upon them.

The second sentence of Rule 703 (the Court of Appeals mistakenly mentioned Rule 702, see 786 F. 2d at 1199, p. A-17, infra) is the most controversial aspect of that Rule. 3 *Weinstein's Evidence* (1984) p. 703-8. Yet that sentence was in the rule as originally promulgated by this Court, and Congress made no change in it. *Id.*, p. 703-1. The Advisory Committee Note points out that this sentence authorized the "presentation of data to the expert outside of court and other than his own perception. In this repsect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions..."

Our point here, under Rule 703, is not simply that the courts below made an incorrect ruling. Our point is *the administration* of the second sentence of Rule 703. The second sentence clearly requires an inquiry into the "type" of facts or data upon which the expert proposes to rely, before a ruling can be made by the court. But here, the District Judge made no such inquiry and the Court of Appeals did not correct him.

Beyond question, a powerful argument could have been presented here supporting the fact that the documents from Chrysler's own files (Exhibit 26), the correspondence between NHTSA and Chrysler (Exhibit 16A), and the internal memoranda written by NHTSA's own Safety Defects engineer (Exhibit 16B), were — whether or not they were admissible in evidence — "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the

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[1] As we explained in our Statement of the Case, supra, p. 5, the Court of Appeals' remark that the District Judge offered to reconsider "the scope of Dr. Kirk's testimony" was absolutely incorrect. The Judge's comment was directed only to certain consumer questionnaires and did not go to the critical documents, those obtained from Chrysler and NHTSA.

subject." See *Lewis v. Rego Co.*, 757 F. 2d 66 (3rd Cir. 1985) (expert in product liability case may testify concerning his conversation with another expert who had studied the explosion involved); *Seese v. Volkswagenwerk, A.G.*, 648 F. 2d 833 (3rd Cir. 1981), cert. den. 454 U.S. 867) (expert engineer in automobile product liability case may base part of his testimony on report not comparable to the accident in the case; this goes only to weight, not admissibility); *Frazier v. Continental Oil Co.*, 568 F. 2d 378 (5th Cir. 1978) (expert in fire damage case may base his testimony on inadmissible National Fire Protection Association publication dealing with standard of care in the industry); *Baumhoser v. Amax Coal Co.*, 630 F. 2d 550 (7th Cir. 1980) (expert in blasting damage case was entitled to rely upon hearsay evidence consisting in part of statistics derived from questionnaire of near-by residents, only partially verfied by the witness).

The required procedure for administration of the second sentence of Rule 703 is not a secret. 3 *Weinstein's Evidence* (1984) specifically states, p. 703-23: "If rules other than hearsay bar admissibility the court must also first decide whether the expert cold reasonably have relied on the data." The Third Circuit, in the important case of *In re Japanese Electronics Products Antitrust Litigation*, 723 F. 2d 238 (1983), said at p. 277 that under this section of Rule 703

> the district court must make a factual inquiry and finding as to what data experts in the field find reliable.

The Third Circuit's opinion in the *Japanese Electronic Products* case is unusually instructive. That was an antitrust action in which a proffer was made of the testimony of economic experts, based upon certain materials. The District Judge excluded this expert opinion evidence, and this was error. The Third Circuit noted with approval that the trial court first "held that it must make a factual determination under Rule 104(a) as to whether experts in the field rely upon the type of data relied upon. Such a determination must be made when there is a factual dispute over such reliance." 723 F. 2d at 276. But the trial court erred when it disregarded the evidence of experts as to the type of evidence to be relied upon, and instead the court made its own determination whether the underlying evidence was of the appropriate type. "The proper inquiry is not what the court deems reliable but what experts in the relevant discipline deem it to be." 723 F. 2d at 276. And the Third Circuit again emphasized, 723 F. 2d at 277, that

> as a matter of law, the district court must make a factual inquiry and finding as to what data experts in the field find reliable. *There is no discretion to forbear from making this inquiry and finding.* (Emphasis added)

A good statement of the purpose of the second sentence of Rule 703 was made by the Sixth Circuit in *Mannino v. International M'fng. Co.*, 650 F. 2d 847, 851 (1981):

> The purpose of Rule 703 is to make available to the expert all of the kinds of things that an expert would normally rely upon in forming an opinion, without requiring that these be admissible in evidence. Under the Rule, the expert is free to give his opinion relying upon the types of data an expert would normally use in forming an opinion in his area of expertise. In short, through Rule 703, the law is catching-up with the realities of professional life.

It appears that the Court below possesses perhaps a grudging view of Rule 703 and refrains from holding the trial judge to the requirements of the Rule. In *Merit Motors, Inc. v. Chrysler Corporation*, 569 F. 2d 666 (D.C. Cir. 1977), an antitrust case, for example, plaintiffs' economic expert gave testimony on deposition which was given no weight by the District Judge, who granted summary judgment for defendant. The District Judge dismissed the expert's testimony as "based solely on speculations and hypotheses and is unsubstantiated by any evidence in the record," 569 F. 2d at 672, but the Judge did not — so far as appears — make the required Rule 703 inquiry. And this Court of Appeals failed to correct that procedure, instead sustaining the decision below.

CONCLUSION

The decision of the Court of Appeals below illustrates that it, and other federal appellate courts, have slipped into a framework in which they are glossing over the procedural defects of the District Courts in administering Rules 403 and 703, by doing on the appellate level the job that the trial judge is supposed to do. It is important to set the federal judicial system straight, by requiring the Courts of Appeals to hold the District Courts to their base-line function under these Rules. This Court should grant certiorari for this purpose.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5738

HARRIET BROOKS, et al., APPELLANTS

v.

CHRYSLER CORPORATION

No. 84-5753

HARRIET BROOKS, et al.

v.

CHRYSLER CORPORATION, APPELLANT

Appeals from the United States District Court
for the District of Columbia
(Civil Action No. 83-02307)

Argued December 16, 1985

Decided March 28, 1986

Charles C. Parsons for appellants in No. 84-5738 and cross-appellees in No. 84-5753.

James A. Hourihan, with whom *David A. Kikel* was on the brief for appellee in No. 84-5738 and cross-appellant in No. 84-5753.

Before: WALD and MIKVA, *Circuit Judges*, and SWYGERT, *Senior Circuit Judge*, United States Court of Appeals for the Seventh Circuit.*

SWYGERT, *Senior Circuit Judge*: In this products liability case, the plaintiffs appeal from the district court's action in directing a verdict for the defendant. More specifically, plaintiffs contend the trial judge erred in excluding five proffered exhibits on the grounds of hearsay, irrelevancy, and unfair prejudice. We affirm.

I

On July 16, 1982 Linda Emerson, accompanied by Jerome McNair, was driving north along Alabama Avenue, S.E., in the District of Columbia in her 1979 Chrysler LeBaron. Upon approaching the intersection of Alabama Avenue and Irving Place, S.E., the car pulled abruptly to the right and crashed into a telephone pole, injuring both Emerson and McNair. Emerson later died from the injuries she sustained during the crash.

The plaintiffs in this action—Harriet Brooks (the administratrix of Emerson's estate)—and McNair—claim that the car accident was caused by brake piston seizure of the right front wheel. Brake piston seizure occurs when, after the driver has released the brake pedal, the piston remains in contact with the wheel rotor, thereby preventing rotation of the wheel on the axle. The car will then pull in the direction of the non-rotating wheel. The plaintiffs further claim that the alleged brake piston seizure in the 1979 LeBaron resulted from defectively

* Sitting by designation pursuant to 28 U.S.C. § 295.

designed brakes. The alleged defect is the "lip-in" dust-boot which, according to the plaintiffs, permits corrosive material to enter the caliper bore and retard piston retraction during and after braking.

In support of their theory that the lip-in dust-boot constituted a design defect and was the cause of the accident and that Chrysler knew about the defect but failed to warn customers or to correct the defect, the plaintiffs intended to present to the jury five exhibits (Exhibits 16A, 16B, 17, 26, and 34) relating to a 1978-80 National Highway Traffic Safety Administration, ("HSA"), investigation into brake piston seizure in 1976-80 Chrysler vehicles as evidence of "prior occurrences of piston seizure under substantially similar circumstances." Plaintiffs' Pretrial Brief at 16. Exhibit 17 consisted of 330 consumer complaints. Most of these complaints were in the form of questionnaires that HSA mailed to Chrysler car owners pursuant to its investigation of the brake piston seizure problem.[1] In the questionnaires, the owners identified the year, make, and model of their Chrysler cars, the mileage, and the composition of the steering and braking systems; the owners also detailed their complaints about problems with the vehicle and how those problems interfered with their operation of the car. Exhibit 34 consisted of 98 questionnaires selected from Exhibit 17 by the plaintiffs' expert witness, Dr. James A. Kirk.

Exhibits 16A and 16B were documents obtained from HSA files. Exhibit 16A was comprised of correspondence between HSA and Chrysler regarding the problem of brake piston seizure. Exhibit 16B consisted of two internal memoranda written by HSA's safety defects

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[1] Some of the complaints received by the HSA were unsolicited.

engineer in which he described the investigation and the consumer complaints.

Exhibit 26 is Chrysler's internal file on the HSA investigation. In addition to the correspondence contained in Exhibit 16A, Exhibit 26 also contained correspondence with the Canadian government's department of transportation, and internal Chrysler memoranda detailing Chrysler's own investigation into the problem and its strategy to deal with it.

Chrysler moved seeking *in limine* to exclude all five exhibits. It argued that the five exhibits were inadmissible because they were hearsay and because the plaintiffs had not shown that they represented instances of substantially similar prior occurrences; that even if they did represent such instances, they were inadmissible under Fed.R.Evid. 403 because whatever minimal probative value they had was substantialy outweighed by the risk of undue prejudice. Chrysler added that Exhibits 16A and 26 were inadmissible because they did not constitute admissions within the meaning of Fed.R.Evid. 801(d)(2) and that Exhibit 16B was inadmissible because it is not a public record within the meaning of Fed.R.Evid. 803(8)(C). Finally Chrysler argued that, even if Exhibit 16B were a public record, it should be excluded because the information forming the basis for the two memoranda was inherently unreliable. The plaintiffs in turn filed their own motion *in limine* seeking to exclude all references to the fact that Emerson and McNair were not wearing their seatbelts at the time of the accident.

Essentially agreeing with all of Chrysler's arguments, the district judge granted Chrysler's motion in full.[2] The district judge, however, offered to reconsider his ruling with respect to several of the questionnaires contained in

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[2] The district judge did not articulate his specific reasons for excluding these exhibits, noting generally that he concurred in Chrysler's position.

Exhibit 34 if the plaintiffs would have the owners submitting those questionnaires testify. He further ruled that the plaintiffs' expert, Dr. Kirk, could not rely on any of these exhibits when testifying, but he offered to reconsider this ruling when Dr. Kirk was examined on *voir dire*. The district judge also granted the plaintiffs' motion to exclude all references to Emerson's and McNair's failure to use seatbelts.

After presenting two witnesses who testified as to the chain of custody of the car after the accident, the plaintiffs' counsel rested the case apparently because he believed that the judge's evidentiary rulings had severely undermined his case and because Dr. Kirk had indicated that he could not testify that there was a design defect if he could not rely on the excluded exhibits.[3] Chrysler moved for a directed verdict, which the district judge granted after discussing with the plaintiffs individually the nature of his rulings and the effect of their counsel's action on Chrysler's settlement offer. The plaintiffs' ap-

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[3] At trial the plaintiffs' counsel stated that he was resting this case because "I have spoken to . . . [our expert] at length last night and I understand he called my office at lunchtime today and he cannot testify that there was a design defect based on the information he has." Plaintiffs' counsel thus appeared to state that his expert would not, under any circumstances, testify that Emerson's LeBaron brake system was defectively designed. Nonetheless, given the context in which the plaintiffs' counsel made this statement, we believe the implication is clear that the expert was unwilling to testify regarding a design defect if he could not rely on the previously-excluded exhibits. We fail to understand this unwillingness, however. In the pretrial brief, the plaintiffs represented that their expert would be relying on videotape, photos, depositions of several witnesses to the accident, and the depositions of several Chrysler engineers in addition to the materials compiled by the HSA. In addition, the pleadings demonstrate that the plaintiffs' expert had already formulated an opinion that the lip-in dust-boot constituted a defective design even before he had access to the HSA materials. *See* App. at 845-47.

peal is based on the trial judge's evidentiary rulings; Chrysler cross-appeals from the order excluding evidence of failure to use seatbelts.

II

A.

At the hearing held on the parties' motion *in limine*, Chrysler's primary argument in support of exclusion of all five exhibits was that they did not represent examples of substantially similar prior occurrences because the 1978-80 HSA investigation related to a distinct cause of brake piston seizure. According to Chrysler, the investigation revealed only that the lip-in dust-boot was difficult to install properly in its groove or that it was easily pulled out of groove by brake friction. The out-of-groove dust-boot resulting from misinstallation or friction permitted water and other materials from the road (*e.g.*, salt) to seep into the caliper bore causing corrosion on the *side* of the caliper bore on the land area between the dust-boot and the hydraulic seal. This corrosion could ultimately cause the piston to retard during contraction. Chrysler argued that the exhibits generated by the investigation were therefore irrelevant, *see* Fed.R.Evid. 401, because the plaintiffs' claim was that the lip-in dust-boot was defective *per se* in that it failed to prevent corrosive materials from seeping into the *bottom* of the caliper bore even when it was properly seated in its groove.

Chrysler further argued that the exhibits were properly excludable under Rule 403 [4] because they were minimally probative on the issue of whether the Emerson vehicle suffered from the particular design defect alleged by the

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[4] Fed.R.Evid. 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

plaintiffs and whether the accident was caused by this defect, and the evidence was likely to be unfairly prejudicial to Chrysler and confusing to the jury.

In support of their claim that the exhibits represented substantially similar prior occurrences and were probative of the central issues in this case, the plaintiffs noted that the subject of the HSA study was 1976-1980 model Chrysler automobiles (including the LeBaron model) fitted with the lip-in style dust-boot mounted on a 2.75-inch-diameter sliding plastic piston and that the Emerson vehicle was a 1979 Chrysler LeBaron fitted with that particular dust-boot. They further argued that the HSA study showed that brake piston seizure was caused by corrosion forming on the caliper bore which caused the vehicle to pull sharply in the direction of the "frozen" wheel. In the instant case, their examination of the Emerson LeBaron completed shortly after the accident revealed that there was corrosion on the bottom of the caliper bore and that the right front wheel was "frozen" on its axle. In addition, the plaintiffs asserted that their witnesses would testify that the Emerson LeBaron pulled sharply to the right—the direction of the "frozen" wheel —shortly before smashing into the telephone pole.

In response to Chrysler's argument that the HSA study was narrowly confined to the problem of out-of-groove dust-boots, the plaintiffs relied on several extracts from the exhibits which the plaintiffs argued demonstrated that the HSA investigation was concerned with piston seizure resulting from a defectively-designed dust-boot that permitted corrosive products to bypass even a properly-seated dust-boot. The first such extraction was a warranty summary drawn from Chrysler's May 8, 1979 letter (contained in Exhibits 16A and 26) to the HSA responding to questions posed by it. The warranty information was set forth in a chart. Column 1 of the chart identified the model year; column 2 identified the model; column 3 identified one warranty code ("Replace caliper 05-81-

00") and was itself further broken down into subcolumns labelled "dust-boot misinstalled" and "piston seized"; and column 4 identified another warranty code ("Replace caliper 05-81-05 piston seized"). The chart thus identified the number of warranty claims received by Chrysler from dealers against each of the relevant warranty codes for each model of car. Plaintiffs argued that column 3 demonstrates that only a small percentage of piston seizure was caused by misinstallation of the dust-boot because the subcolumn "dust-boot misinstalled" only accounted for a small percentage of "replace calipers," whereas the "piston-seized" of column 4 and the subcolumn of column 3 accounts for a much larger percentage of "replace calipers."

The plaintiffs also relied on a drawing contained in Exhibit 16A, as well as in 16B, made by HSA's safety defects engineer in which he identified the "area of corrosion" on both sides of the hydraulic seal. The plaintiffs also observed that, at least once, when identifying the source of the problem, Chrysler referred to a "malfunctioning dust-boot" which "allows water to enter the cylinder bore outside of high-pressure seal" (App. at 238, 341) and that Chrysler's engineers referred to the dust-boot problem as a "basic design problem" (App. at 386). Both parties advance these same arguments on appeal.

B.

Evidence of prior instances is admissible on the issues of the existence of a design defect and a defendant's knowledge of that defect only if a plaintiff shows that the incidents "occurred under circumstances substantially similar to those at issue in the case at bar." *McKinnon v. Skil Corp.*, 638 F.2d 270, 277 (1st Cir. 1981). *Accord Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1332 (8th Cir. 1985); *Edwards v. Consolidated Rail Corp.*, 567 F. Supp. 1087, 1106 n.29 (D.D.C. 1983), *aff'd mem.*, 733 F.2d 966 (D.C. Cir.), *cert. denied*, 105

S. Ct. 252 (1984). Even when substantial similarity of circumstances is proven, the trial judge has broad discretion to exclude those exhibits under Rule 403. *McKinnon*, 638 F.2d at 277. *See, e.g., Borden, Inc. v. Florida East Coast Ry.*, 772 F.2d 750, 755 (11th Cir. 1985).

We agree with Chrysler that the trial judge did not abuse his discretion in excluding these exhibits under Rule 403.[5] The exhibits are minimally probative on the issue of whether the Emerson vehicle suffered from the defect alleged by the plaintiffs and whether that defect caused the accident. We have reviewed these exhibits in considerable detail, and we can find nothing in them that expressly supports the plaintiffs' claims that a properly-seated dust-boot permits the passage of corrosive materials and that it therefore may have caused the accident in this case. In those exhibits the only cause noted for brake piston seizure is the out-of-groove dust-boot. (*See e.g.*, App. at 281, 307, 309, 315, 318, 323, 358, 359, 361, 364, 383, 386, 397, 401.) *See also* App. at 257 (Design changes[6] undertaken to 'minimize any potential for mis-assembly and/or roll out of the boot seal.").[7]

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[5] Because we find that the district judge properly excluded these exhibits under Rule 403, we do not reach the issues of whether the plaintiffs failed to make the requisite showing of substantial similarity or whether any of the exhibits qualified for admission under any of the hearsay exceptions relied on by the plaintiffs.

[6] The design/manufacturing changes were:

1. Piston molding and machinery changes which relocate the piston boot seal groove further outboard to minimize the potential for the piston to roll the seal out of its caliper bore groove.

2. A new boot seal, incorporating a steel ring insert in its outer diameter section, to press-fit into the caliper piston bore to provide positive seal retention.

[7] An article from the *Washington Post* regarding brake piston seizure in Chrysler's automobiles set forth in another of the plaintiffs' proposed exhibits also identified the source of the problem as an out-of-groove dust-boot. That article

Nor does the warranty summary support the plaintiffs' claims. At the hearing, Chrysler gave a detailed explanation of the warranty information. Counsel stated that columns 3 and 4 represented warranty codes under which the dealer making repair work would claim reimbursement for certain types of work. Column 3 represented the old warranty code under which the dealer would claim a smaller amount when the caliper assembly needed replacement because the dust-boot was improperly installed (subcolumn 1) or a greater amount when the assembly had to be replaced because the piston had become seized due to an out-of-groove dust-boot resulting from misinstallation or internal brake friction (subcolumn 2). Column 4 represented a new warranty code introduced in 1977 which was only applicable to the piston seizure problem. For this reason, no warranty data for 1976 appeared under the new code, while warranty data under the old code dropped dramatically in 1977 and decreased thereafter as dealers adjusted to the new warranty codes. In addition, Chrysler stated that the preparers of the warranty summary would testify that this was the proper interpretation of the data. Chrysler had also identified this distinction in the two warranty codes in its answers to the plaintiffs' interrogatories, noting that each subcolumn in column 3 had its own identifying digits in addition to the code 05-81-00; it had also suggested in an earlier letter to the HSA that the two codes, old and new, existed.

In contrast, the plaintiffs presented no argument for their interpretation of the warranty summary, even though they had the opportunity to depose the preparers of the document. And they present no new arguments on appeal. In addition, their interpretation conflicts with the actual wording of the chart that the warranty code 05-81-05 was simply inapplicable in the year 1976. More-

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also contained pictures of the lip-in dust-boot, illustrating how the dust-boot becomes unseated. *See* App. at 101-03.

over, nothing on the face of that summary or in the document containing the summary suggests that the two subcolumns of column 3 are mutually exclusive, or that the "piston seizure" referred to in subcolumn 2 of column 3 could not have been caused by dust-boot misinstallation or an out-of-groove dust-boot from whatever cause. Indeed, at one point, the plaintiffs' counsel appeared to concede that the subcolumns of column 3 were not mutually exclusive. *See* App. at 778.

The plaintiffs' other arguments in support of their claim that the subject of the HSA study was substantially similar to the defect alleged in this case and hence probative of central issues are also unpersuasive. The diagram identifying corrosion build-up on both sides of the hydraulic seal is not only based on unverifiable sources of information,[8] but it is also only relevant insofar as it undermines Chrysler's claim that corrosive materials cannot bypass a properly-seated hydraulic seal. The threshold issue here, however, is whether the HSA investigation suggests that corrosive materials seep past both properly and improperly-seated dust-boots, and nothing in that diagram establishes that corrosive materials enter the caliper bore through a properly-seated dust-boot.[9] Moreover, the plaintiffs' claim is that cor-

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[8] The plaintiffs concede that the June 21, 1980 memorandum containing this drawing was based on the HSA/correspondence (Exhibit 16A), consumer complaint about Chrysler cars (Exhibits 17 and 34), and consumer complaints about other makes of American cars. Our detailed review of these exhibits reveals that none of them supports the "conclusion" in the drawing that corrosion builds up on both sides of the hydraulic seal. Thus, the engineer's conclusion may have been speculation or may have been based on the complaints received about other cars, complaints which are not part of the record.

[9] In fact, the memorandum to which that diagram is attached identifies the cause as an out-of-groove dust-boot resulting from internal brake friction or misinstallation. App. at 297.

rosion formed in the *bottom* of the caliper bore; at most, this diagram shows that corrosion forms on the side. Furthermore, in the August 24, 1979 letter in which the Chrysler engineer refers to a "basic design problem," that same engineer notes that the problem "was not entirely due to improper boot installation . . . [but also to] friction between the upper lip and surface of the piston [that] tends to pull the boot *out-of-the groove.*" (emphasis added).

The plaintiffs stated that their expert would testify at trial that the subject of the HSA study was the same defect they alleged existed in the Emerson LaBaron. But the plaintiffs were called upon to establish the probative value of their proffered exhibits before trial and in the ordinary course of events substantial similarity or identity of circumstances must be established before such exhibits will be admitted.[10] In this regard, we fail to see why the plaintiffs' expert could not have given this testimony as an offer of proof at the proceedings on the motions *in limine.*[11] *See Ramos v. Liberty Mutual Ins. Co.*,

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[10] The plaintiffs appear to have misconceived their burden of proof. In their pretrial brief, the plaintiffs argued that the central issue for trial would be whether the HSA exhibits represented substantially similar prior occurrences. The district judge, however, properly perceived that the central issues for trial were whether the brake system of the Emerson LeBaron was defectively designed and whether that system was the cause of the accident. The collateral issues of whether the exhibits represented substantially similar prior occurrences and were sufficiently probative to be admitted were properly to be resolved before trial in order to avoid confusion of the issues and inordinate, unjustifiable delay of the trial.

[11] In fact, the district judge gave the plaintiffs another opportunity to make this offer of proof when their expert, Dr. Kirk, was questioned regarding the scope of and foundation for his expert testimony—an opportunity the plaintiffs inexplicably declined. App. at 986. *See Vockie v. General Motors Corp., Chevrolet Div.*, 66 F.R.D. 51, 62, *aff'd mem.*,

615 F.2d 334, 339 (5th Cir. 1980), *cert. denied sub nom. Rucker Co. v. Shell Oil Co.*, 449 U.S. 1112 (1981).

It is also significant that, in arguing for the admissibility of these exhibits, the plaintiffs' counsel appeared to concede that the exhibits identified the out-of-groove dust-boot as the source of the problem. *See* App. at 738, 743. *But see* App. at 744. In addition, the design changes were directed toward providing "positive boot seal retention" in the groove, *see* App. at 280, and there is no evidence that after design changes were implemented the brake piston seizure problem continuel. Finally, these exhibits do not demonstrate that brake piston seizure was a pervasive problem throughout Chrysler's entire fleet of 1976-1980 model cars that caused accidents similar to the one that occurred in this case. These exhibits showed that approximately two percent of Chrysler's cars suffered from the problem and only a few minor accidents had resulted from it.[12]

Thus, even if the subject HSA had under investigation is conceded to be a "defective design," these exhibits only identify the "design defect" as a dust-boot that, for whatever reason, easily comes out of groove; not a dust-boot that, in every case, permits corrosive matters to enter the caliper bore. As a result, the trial judge was amply justified in concluding that these exhibits were minimally probative on the key issues of plaintiffs' case.

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523 F.2d 1052 (3d Cir. 1975) (previously excluded exhibits were admitted after plaintiff extensively cross-examined the defendants' expert).

[12] In the September 30, 1981 memorandum in Exhibits 16A and 16B, the safety defects engineer also observed that ordinarily the agency receives an upsurge in complaints when a potential safety hazard is widely publicized, but that the HSA had not received such an upsurge after publication of the *Washington Post* article, discussed *supra* note 7, thereby indicating that the problem was not particularly widespread. *See* App. at 291.

This is particularly true with respect to Exhibits 17 and 34, which contained the questionnaires that formed the basis of the HSA's investigation and the plaintiffs' claim that the lip-in dust-boot caused the Emerson accident. Many of the questionnaires identified brake piston seizure that resulted specifically from an out-of-groove dust-boot or from sources other than the dust-boot (*e.g.*, swollen pistons, defect in the master brake cylinder, warped brake pistons). Others failed to identify the source of the brake piston seizure; still others did not involve brake piston seizure at all. And in none of these complaints did the owner specifically identify corrosion resulting from seepage past a properly seated dust-boot as the cause of the brake piston seizure.

We recognize that these exhibits do not definitively rule out causes other than the out-of-groove dust-boot; *see, e.g.*, App. at 361 (design changes will "reduce" brake piston seizure); App. at 317 (ambiguous test results regarding seepage of corrosive materials by dust-boot); App. at 318 ("We feel that press-on caliper piston dust-boot would alleviate *some* of the piston sticking problem."); App. at 361 (same); App. at 385 (problem *usually* associated with out-of-groove dust-boots); and that the defect alleged by the plaintiffs—piston seizure resulting from a poorly-designed dust-boot—is somewhat similar to the "defect" under study by the HSA. We also recognize that evidence of similar incidents may be particularly probative on the issue of whether one particular product contained a specific defect. *See Ramos*, 615 F.2d at 339; *Rhodes v. Michelin Tire Corp.*, 542 F. Supp. 60, 62 (E.O. Ky. 1982). This type of evidence, however, is not particularly probative when, as in this case, it does not even suggest that the defect alleged by the plaintiffs exists or that any of the few reported accidents were caused by that defect, and it only shows the possible existence of another similar, but not identical, defect in approximately two percent of Chrysler's

automobiles manufactured during 1976-1980. *Cf. Uitts v. General Motors Corp.*, 411 F. Supp. 1380, 1383 (E.D. Pa. 1974), *aff'd mem.*, 513 F.2d 626 (3d Cir. 1975) (proffered exhibits minimally probative where they only accident involving similar, but not necessarily identical, vehicles); *Vockie v. General Motors Corp., Chevrolet Div.*, 66 F.R.D. 57, 61, 63, *aff'd mem.*, 523 F.2d 1052 (3d Cir. 1975).

The fact that these exhibits were minimally probative in this case does not automatically justify their exclusion. The Federal Rules of Evidence generally favor the admissibility of relevant evidence, leaving it to the parties to argue the weight that should be given that evidence, *see* S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* at 85 (3d ed. 1982); 1 D. Louisell & C. Mueller, *Federal Evidence* § 91, at 638 (1977). As a result, Rule 403 requires that the probative value be substantially outweighed by the risk of unfair prejudice, trial delay, and jury confusion before relevant evidence will be excluded.

At least one court has observed that "[p]roof of prior accidents or occurrences are not easily admitted into evidence because they are often the result of unfair prejudice, consumption of time and distraction of the jury to collateral matters." *Uitts*, 411 F. Supp. at 1383, citing McCormick, *McCormick on Evidence* § 200 (2d ed. 1972). Although we do not necessarily agree with this observation, it is clear that in this case admission of the exhibits in this case would lead to this very result. With respect to Exhibits 17 and 24, the questionnaires are riddled with complaints about problems with the other automobiles, unrelated to brake piston seizure, by customers dissatisfied with Chrysler's refusal to extend the warranty to cover the repairs of the dust-boot; highly inflammatory remarks about Chrysler, including comments about poor workmanship in general and about Chrysler's failure to cover the problem under the war-

ranty; and third-party hearsay comments by the owners' mechanics and friends regarding the prevalence of brake piston seizure in Chrysler cars. In addition, the other exhibits suggest, as the plaintiffs note, Chrysler was somewhat cavalier in its dealing with the agency in admitting the scope of the problem and the possibility of a safety hazard, and "hardnosed" in its approach to warranty repairs. As such, these exhibits were "unfairly prejudicial" within the meaning of Rule 403. Advisory Committee Note to Fed.R.Evid. 403 (" 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional.").

Furthermore, it cannot be doubted that the trial inevitably would have been delayed as Chrysler would have attempted to rebut the substance of *each* of the 330 complaints or to distinguish the nature of the complaints contained therein from the alleged defect in this case. *See Ellis v. International Playtex, Inc.*, 745 F.2d 292, 303, 305 (4th Cir. 1984). The trial would have been further delayed by an extensive foray into the nature and extent of the HSA investigation, and the jurors' attention would have been diverted from the specific claim of the plaintiffs to the subject under study by the HSA. *See* also *supra* note 10.

We therefore conclude that the district judge properly concluded that the minimum probative value of these exhibits was substantially outweighed by the risk of unfair prejudice, trial delay, and jury confusion and that he therefore did not abuse his discretion in excluding these exhibits under Rule 403. In reaching this conclusion, we also note that the plaintiffs made no effort to delete from these exhibits obviously prejudicial, irrelevant hearsay material. *See* McCormick, *Handbook of the Law of Evidence*, at 112 (2d ed. 1972) (trial court can properly exclude an entire exhibit if parts of that exhibit are inadmissible and the proponent of the evidence has made no attempt to differentiate between the admissible and the

inadmissible). We also note that the offer of proof made by the plaintiffs at the hearing on the motions *in limine* as to the probative value of these exhibits was simply inadequate to rebut Chrysler's convincing arguments of low probative value, prejudice, confusion and trial delay, and that the plaintiffs were given another opportunity to make a better offer of proof—an offer which they declined. Under these circumstances, we believe the trial judge was amply justified in excluding these exhibits. A judge understandably might be more reluctant to exclude proffered exhibits under Rule 403 where, as here, those exhibits evidently form the core of the plaintiffs' case. But the plaintiffs simply cannot demand that the judge admit wholesale, unedited prejudicial exhibits that will cause substantial delay in the trial particularly when they make little effort to first convince the court of the probative value of these exhibits.

The plaintiffs also complain that the district judge improperly prohibited their expert from relying on these exhibits in formulating his opinion about the existence of a design defect in the Emerson LeBaron and the cause of the accident. *See* Fed.R.Evid. 702. This argument is without merit. Shortly before permitting the plaintiffs' counsel to rest his case, the district judge made clear that the scope of Dr. Kirk's testimony was still open to reconsideration when Dr. Kirk was examined on *voir dire*. *See supra* at 5 and note 11.

We rule that the trial judge did not abuse his discretion in excluding the exhibits in question under Rule 403 or improperly preclude the plaintiffs' expert from relying on these exhibits. We therefore do not reach the other issues raised by this appeal and by Chrysler's cross-appeal. The judgment of the district court is affirmed.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of the foregoing Petition for Writ of Certiorari by depositing copies of same in the United States mail, first class postage prepaid at Washington, D.C., upon:

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This the 1st day of August, 1986.

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Supreme Court, U.S.
FILED
AUG 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-165

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

HARRIET BROOKS AND JEROME MCNAIR,
Petitioners,

v.

CHRYSLER MOTORS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT REQUIRED BY RULE 28.1

Respondent in this action is a corporation whose name has recently been changed from Chrysler Corporation to Chrysler Motors Corporation. Chrysler Motors is a wholly owned subsidiary of a newly created, publicly owned holding company which has now been renamed Chrysler Corporation. The following corporations are subidiaries or affiliates of Chrysler Motors Corporation:

Automotive Financial Services, Inc.
Chrysler Canada, Ltd.
    Chrysler Leasing, Ltd.
Chrysler Capital Corporation
Chrysler Corporation Fund
Chrysler Credit Corporation
Chrysler Export Corporation
Chrysler Export Sales Inc.
Chrysler Financial Corporation
    Chrysler Commercial, S.A. de C.V.
    Chrysler Credit Canada Ltd.
        Chrysler Finance Limited
        Chrysler Life Insurance Company of Canada
    Chrysler Credit Corporation
    Chrysler Credit SBL Corporation
    Chrysler Credit Venezuela, S.A.
    Chrysler Financial Overseas Capital N.V.
    Chrysler Insurance Company
        Chrysler Life Insurance Company
    Chrysler Leasing Corporation
    Redisco Canada Ltd.
Chrysler First, Inc.
Chrysler Foreign Sales Corporation
Chrysler Institute of Engineering
Chrysler International S.A.
    CISA Financial Services S.A.
Chrysler International Services S.A.

Chrysler Italian Imports Inc.
Chrysler Learning Inc.
    Automotive Education Centers Inc.
Chrysler Learning Management Corporation
Chrysler Marine Corporation
Chrysler de Mexico S.A.
    Aire y Temperatura S.A.
Chrysler Overseas Capital Corporation
Chrysler Overseas Trading Co. Ltd.
Chrysler Plastic Products Corporation
Chrysler Realty Corporation
    Chrysler Realty Management Corporation
Chrysler San Juan Inc.
Chrysler Service Contract Company
Chrysler Training Corporation
Chrysler Transport, Inc.
Gulfstream Aerospace Corporation
NuCar Prep System, Inc.
Pentastar Aviation, Inc.
Productos Electros Diversificados S.A.
Van Pool Services Inc.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

RESTATEMENT OF THE CASE

This is a diversity action brought by Petitioners against Respondent Chrysler Motors Corporation ("Chrysler") in the United States District Court for the District of Columbia. Petitioners claimed in the courts below that they were injured in an automobile accident caused by a defect in an automobile manufactured by Chrysler.

Before a jury was impaneled to try Petitioners' claim, the District Court heard argument on various motions *in limine* filed by both sides. Petitioners moved the court to exclude from trial any evidence that they were not wearing seatbelts at the time of the accident; the court granted that motion. Chrysler moved the court to exclude certain exhibits proffered by Petitioners; the court also granted that motion.

The exhibits proffered by Petitioners were related to certain investigations conducted by Chrysler and the National Highway Traffic Safety Administration ("NHTSA") during 1978-80.[1] Petitioners contended that these documents concerned the same brake defect involved in their accident and that the documents should therefore be admitted to show that this alleged defect in fact caused their accident and that Chrysler knew about the defect.

Chrysler moved the District Court to exclude these exhibits on three grounds: that they were hearsay; that Petitioners had not met their burden of showing substantial similarity between their accident and the occurrences addressed in the prior investigation; and that, even if the prior occurrences were sufficiently similar to be minimally probative, they should be excluded pursuant to Fed. R. Evid. 403 because their probative value was substantially outweighed by the danger of unfair prejudice, undue delay and jury confusion.

During two days of hearings on the motions *in limine*, the District Court heard extensive argument and proffers of testimony concerning the construction and operation of brake calipers, brake pistons, dust boot seals, high-pressure hydraulic seals, and caliper bores. *See* Appellants' Appendix ("App.") at 637-874. The court also examined hundreds of pages of engineering documents, schematics, and reports developed during the investigations by Chrysler and NHTSA, and closely examined physical models and cut-aways of the disc brake calipers from Petitioners' automobile. App. at 791-800.

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[1] These exhibits included hundreds of consumer complaints submitted to NHTSA by vehicle owners (Exs. 17 and 34) and two preliminary reports (Ex. 16B) prepared by a NHTSA engineer on the status of his review of these complaints. NHTSA's correspondence with Chrysler on this issue was offered as Exhibit 16A, and documents regarding Chrysler's own investigation of the matter were offered as Exhibit 26.

Furthermore, during these hearings the court considered evidence and entertained argument concerning the potential for unfair prejudice, undue delay and jury confusion which could result from the introduction of these exhibits. For example, as Chrysler stressed in its arguments, the vehicle owner complaints threatened to unfairly prejudice the jury in part because of the inflammatory, multiple hearsay statements by irate owners and unidentified mechanics. *See, e.g.*, App. at 674-78, 688. Moreover, as the Court of Appeals subsequently noted, to rebut the statements made in these complaints and reported in the NHTSA memoranda, Chrysler would have had to undertake separate mini-trials as to the validity, and substantial similarity, of each of these incidents. This in turn would have threatened to unduly delay the trial and confuse the jury. Pet. App. at A-16.

After reviewing the exhibits and hearing the parties' arguments, the District Court evidenced its agreement with Chrysler's position; the court therefore pressed Petitioners to identify specific information in the exhibits which showed sufficient similarity to the alleged defect in their automobile to warrant admission. *See, e.g.*, App. at 725, 727, 729. After giving Petitioners repeated opportunities to make this requisite showing, the District Court ultimately ruled the five exhibits inadmissible.[2]

In addition to receiving this ruling on the exhibits' admissibility, on several occasions during the hearings Petitioners specifically sought a ruling allowing their expert witness, Dr. Kirk, to rely on these exhibits in giving his testimony. In response, the District Court repeatedly indicated that this issue should be deferred until the *voir dire* examination of the expert. App. at 763-64, 806. Notwithstanding these indications from the court, and

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[2] The District Court alternatively ruled that Exhibits 16B, 17, and 34 were inadmissible on hearsay grounds. App. at 704-06, 745, 874.

without making any evidentiary showing that the exhibits satisfied the requirement of Fed. R. Evid. 703 that they be "of the type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject," Petitioners continued to press for an immediate ruling that their expert was entitled to rely on these exhibits. App. at 763, 801, 812-13. In this context, the District Court concluded that there was no basis at that time for permitting the expert to rely on these exhibits. App. at 813. The court later noted, however, that the matter was subject to reconsideration when Dr. Kirk was examined on *voir dire*. App. at 986.[3]

At no time during the proceedings before the District Court did Petitioners complain of, or object to, any lack of specificity in the court's evidentiary rulings; neither did they request the court to set forth more fully its Rule 403 balancing of the probative value of the proffered exhibits against the risks of unfair prejudice, undue delay and jury confusion; nor did they move the court to conduct any additional factual inquiry to determine whether Rule 703's requirements regarding expert witness testimony had been met.

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[3] In a separate motion *in limine*, Chrysler sought to restrict the scope of Dr. Kirk's testimony at trial on the ground that Petitioners had failed to comply either with Fed. R. Civ. P. 26(b)(4) and 26(e)(1)(B) or with the court's pretrial order regarding the identification of expected expert testimony. During argument on this motion, Petitioners conceded that they had not complied with the requirements for identifying the substance of the expected expert testimony. App. at 838. Accordingly, the District Court ruled that Dr. Kirk's trial testimony would be limited to the opinions and conclusions set forth in his pretrial deposition and report. App. at 849. Significantly, neither Dr. Kirk's deposition testimony nor his report included any opinions and conclusions which were identified as being based on the exhibits at issue. App. at 803-06, 845-49. Thus, this ruling in itself—which was not appealed to the Court of Appeals or raised in the petition to this Court—effectively precluded any testimony by Dr. Kirk that relied on these exhibits.

Following the District Court's disposition of the motions *in limine*, Petitioners chose to call only two witnesses[4] and then rested their case without calling Dr. Kirk to the stand for a *voir dire* examination and without presenting *any* expert testimony to support their claims. Chrysler thereupon moved for a directed verdict. Petitioners offered no argument in opposition to the motion, and the District Court directed a verdict in Chrysler's favor. App. at 983, 991.

On appeal to the United States Court of Appeals for the District of Columbia Circuit, Petitioners sought reversal of the directed verdict against them.[5] The basis of their appeal was that the excluded exhibits had been shown to be substantially similar, were not hearsay, should therefore not have been excluded, and, but for the improper exclusion, a directed verdict would have been avoided. In their briefs to the Court of Appeals, Petitioners did not separately challenge the determination that their expert could not rely on the excluded exhibits, but simply noted that the exclusion of the exhibits "emasculated" their expert's testimony.[6] More importantly, nowhere in their briefs did Petitioners raise the claims they now raise before this Court, *i.e.*, (1) that the District Court committed reversible error by failing to set forth in detail the factors it weighed under Rule 403 in excluding the exhibits and (2) that the District Court also committed reversible error in failing *sua sponte* to develop facts showing whether Petitioners' expert met the re-

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[4] These two witnesses addressed only the chain of custody of Petitioners' automobile following the accident.

[5] In its cross appeal, Chrysler sought reversal of the ruling excluding evidence of the Petitioners' failure to utilize their seatbelts at the time of the accident.

[6] Appellants' Court of Appeals Brief at 27. Petitioners likewise did not challenge the District Court's separate restrictions on Dr. Kirk's testimony due to Petitioners' failure to comply with Fed. R. Civ. P. 26 and the court's pretrial orders.

quirements of Rule 703. Indeed, nowhere in Petitioners' Court of Appeals briefs is there any mention whatsoever of Rules 403 and 703.

Even though Petitioners now fault the Court of Appeals for examining the record to determine whether the exhibits could properly be excluded, Petitioners urged that court to conduct just such an examination. Indeed, the bulk of Petitioners' briefs to the Court of Appeals focused on the design and operation of disc brake calipers and the purported similarity between the engineering problems addressed in the 1978-80 Chrysler/NHTSA investigations and the alleged defect in their own vehicle.[7]

In response, the Court of Appeals made a detailed examination of the record below and of the hundreds of pages of engineering drawings and other documents contained in the five exhibits in question. At oral argument, Petitioners furthermore presented the Court of Appeals with diagrams and schematics illustrating the various components and subcomponents of disc brake calipers and the manufacture and operation of these components. On the basis of its own exhaustive review of the proffered exhibits, the Court of Appeals concluded that "nothing in them" expressly supported Petitioners' claim that the mechanism of corrosion allegedly occurring in their automobile was substantially similar to the problems uncovered by the Chrysler and NHTSA investigations. Pet. App. at A-9. Rather, the court found, the evidence in the exhibits:

> [D]oes not even suggest that the defect alleged by the [Petitioners] exists or that any of the few reported accidents were caused by that defect, and it only shows the possible existence of another similar, but not identical, defect in approximately two percent of Chrysler's automobiles manufactured during 1976-1980.

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[7] *See e.g.*, Appellants' Court of Appeals Brief at 2-26, 31, 34, 37-38, 40; Appellants' Reply Brief at 1-5, 7-10.

Pet. App. at A-14 - A-15. The court therefore determined that the District Court was "amply justified in concluding that these exhibits were minimally probative on the key issues of [Petitioners'] case." Pet. App. at A-13.

The Court of Appeals further determined that introduction of these exhibits presented a substantial risk of unfair prejudice, undue delay and jury confusion. For example, the court found that the consumer questionnaires underlying the 1978-1980 investigators were:

> [R]iddled with complaints about problems with the other automobiles, unrelated to brake piston seizure, by customers dissatisfied with Chrysler's refusal to extend the warranty to cover the repairs of the dust-boot; highly inflammatory remarks about Chrysler, including comments about poor workmanship in general and about Chrysler's failure to cover the problem under the warranty; and third-party hearsay comments by the owners' mechanics and friends regarding the prevalence of brake piston seizure in Chrysler cars.

Pet. App. at A-15 - A-16. Furthermore, said the Court of Appeals, "it cannot be doubted" that the trial would have been delayed by Chrysler's attempt to rebut or distinguish each of the 330 questionnaires and by an "extensive foray" into the "nature and extent" of the 1978-1980 investigations. Pet. App. at A-16. As a result, "the jurors' attention would have been diverted from the specific claim of the [Petitioners] to the subject under study" in the prior investigation. *Id.* The court therefore held that:

> [T]he district judge properly concluded that the minimum probative value of these exhibits was substantially outweighed by the risk of unfair prejudice, trial delay, and jury confusion and that he therefore did not abuse his discretion in excluding these exhibits under Rule 403. In reaching this conclusion, we also note that the [Petitioners] made no effort

> to delete from these exhibits obviously prejudicial, irrelevant hearsay material. . . . [T]he [Petitioners] simply cannot demand that the judge admit wholesale, unedited prejudicial exhibits that will cause substantial delay in the trial particularly when they make little effort to first convince the court of the probative value of these exhibits.

Pet. App. at A-16 - A-17 (citation omitted).[8]

Finally, with regard to Petitioners' suggestion that their expert had been improperly prevented from relying on the excluded exhibits, the Court of Appeals concluded that in fact the District Court had "made clear that the scope of Dr. Kirk's testimony was still open to reconsideration when Dr. Kirk was examined on *voir dire*." Pet. App. at A-17. The Court of Appeals furthermore found "inexplicabl[e]" Petitioners' decision to rest their case without accepting the District Court's offer to hear their expert on *voir dire*. Pet. App. at A-12 n.11. Indeed, based on pretrial material showing that Petitioners' expert had based his opinion on evidence *other than* the excluded exhibits, the court stated that it simply "fail[ed] to understand" why that witness was not called to testify. Pet. App. at A-5 n.3.

In their Petition to this Court, Petitioners do not challenge the conclusion—reached by both the District Court and the Court of Appeals—that the exhibits in question were properly excluded. Instead, for the first time in this lawsuit, Petitioners ask this Court to consider whether reversal is mandatory whenever a district court (1) fails *sua sponte* to specify in detail all factors weighed in excluding evidence under Rule 403 or (2)

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[8] Because of its decision that the District Court properly excluded the exhibits under Rule 403, the Court of Appeals did not reach the questions whether Petitioners had failed to make the requisite showing of substantial similarity or whether any of the exhibits failed to qualify for admission under the applicable hearsay exceptions. Pet. App. at A-9 n.5.

fails *sua sponte* to develop facts showing whether an expert's testimony qualifies for admission under Rule 703. Petitioners contend that Rules 403 and 703 should be interpreted to require such procedures by district courts and that appellate courts must automatically reverse district courts that fail to follow those procedures—even where the facts of record make clear that evidence has been properly excluded under those rules.

As discussed below, Petitioners' contentions are not worthy of consideration by this Court for three reasons: first, the procedures governing Rules 403 and 703 are sensible and well settled, and they were followed by the District Court and Court of Appeals in this case; second, Petitioners' proposed new procedures for those rules are impractical, unnecessary and contrary to established principles of judicial administration; and, third, Petitioners' contentions are in any event not appropriate for review in this case, owing to Petitioners' failure to raise them below and the unlikelihood that review of the contentions by this Court would in any way affect the outcome of this case.

REASONS FOR DENYING THE WRIT

1. The Lower Courts In This Case Followed Sensible, Well-Settled Procedures Concerning Rules 403 and 703.

Contrary to Petitioners' contentions, the lower courts have developed clear, sensible procedures in applying Rules 403 and 703, which were followed in this case, and there is no need for this Court to exercise its supervisory power over the Federal Rules to make radical changes to well-settled procedures.

With respect to Rule 403, district courts have been instructed by the courts of appeals to carefully weigh and balance the probative value of evidence against the dangers of unfair prejudice, undue delay or jury confusion. *See, e.g., Miller v. Poretsky*, 595 F.2d 780, 794 n.41

(D.C. Cir. 1978); *Government of Virgin Islands v. Felix*, 569 F.2d 1274, 1280 (3d Cir. 1978). District courts have also been instructed that the better practice is to place on the record the factors considered in this balancing process. *See, e.g., United States v. Robinson*, 700 F.2d 205, 213 (5th Cir. 1983), *cert. denied*, 465 U.S. 1008 (1984); *United States v. Dwyer*, 539 F.2d 924, 928 (2d Cir. 1976). The rationale for placing Rule 403 findings on the record is twofold: (1) to make clear to the appellate courts that the evidentiary rulings in question were in fact based on an exercise of the discretion given district courts by Rule 403; and (2) to give parties before a district court notice of the nature of the court's objections to the proffered evidence so as to provide those parties with an opportunity to address those objections. *See United States v. Lebovitz*, 669 F.2d 894, 901 (3d Cir.), *cert. denied*, 456 U.S. 929 (1982); 1 J. Weinstein & M. Berger, *Weinstein's Evidence*, ¶ 403[02], at 403-28 (1985). Both of these goals were satisfied in the present case.

Based on the numerous specific invocations of Rule 403 during the proceedings below, the parties (and, on appeal, the D.C. Circuit) had no doubt that the District Court relied in part on its discretion under that rule to exclude the exhibits in question.[9] Petitioners were likewise given ample notice during the hearing as to the District Court's concerns about the risks of unfair prejudice and undue delay, and Petitioners were given ample opportunity during two days of hearings to address the court's objections.

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[9] As the Court of Appeals specifically found, the District Court noted that it "concurred in Chrysler's position," even though it did not state its "specific reasons" for that concurrence. Pet. App. at A-4 n.2. In both its motion *in limine* and its oral arguments, Chrysler repeatedly invoked Rule 403 and stressed the need to balance the probative value of the evidence against the risk of unfair prejudice, undue delay and jury confusion. *See, e.g.*, App. at 180, 193, 722, 740, 782, 796-97.

Moreover, contrary to Petitioners' contentions,[10] in cases where the record had not made clear that the goals of Rule 403 have in fact been served, appellate courts have remanded for further proceedings by the district courts. *See, e.g., Robinson*, 700 F.2d at 214; *Dwyer*, 539 F.2d at 928. Two specific situations have been identified, however, where appellate courts have found it inappropriate or unnecessary to remand a case to the district courts.

First, appellate courts have been reluctant to automatically reverse and remand where the losing party did not request the district court to provide more explicit findings on the record. *See, e.g., United States v. Lavelle*, 751 F.2d 1266, 1279 (D.C. Cir.), *cert. denied*, 106 S.Ct. 62 (1985); *Robinson*, 700 F.2d at 213; *United States v. Long*, 574 F.2d 761, 766 (3d Cir.), *cert. denied*, 439 U.S. 985 (1978). In such circumstances, the party's failure to preserve its objection effectively denies the district court the opportunity to easily and efficiently correct any alleged deficiency, and the party is therefore made to bear the consequences of its implicit waiver. Second, appellate courts have also been reluctant to reverse and remand where the "factors upon which the probative value/prejudice evaluations were made are readily apparent from the record, and there is no substantial uncertainty about the correctness of the ruling." *Lavelle*, 751 F.2d at 1279 (quoting *Robinson*, 700 F.2d at 213). Both of these situations are present here.

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[10] Petitioners contend that "many federal appellate courts" are not following the requirements of Rule 403 and that "[i]f certiorari is granted, [Petitioners] will analyze the cases to demonstrate that this is so." Pet. at 9. Obviously, this Court should not grant certiorari in order to determine whether there are in fact sufficient departures from the Federal Rules to warrant this Court's review. If such departures exist—and we submit they do not—it was Petitioners' burden to describe them with specificity in their Petition.

Had Petitioners believed that the findings underlying the District Court's ruling lacked sufficient specificity, they could and should have immediately brought their concerns to the trial judge's attention. Had Petitioners taken that action, the trial judge could have easily and expeditiously addressed the concerns Petitioners now for the first time express. Instead, whether because of their satisfaction at that time with the specificity of the court's findings or because of tactical considerations, Petitioners at no time during the trial below ever asked the trial court for more specific findings regarding its Rule 403 rulings. In such circumstances, under well-settled case law, they are not entitled to raise this issue for the first time before the Supreme Court. *See FTC v. Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983); *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Tennessee v. Dunlap*, 426 U.S. 312, 316 n.3 (1976).[11]

Moreover, as the Court of Appeals' determinations in this case make abundantly clear, here the record leaves no doubt whatever concerning either the factors considered by the District Court or the correctness of that court's decision to exclude the proffered exhibits. Again, in such circumstances, it is well settled that remand is unnecessary. *See Lavelle*, 751 F.2d at 1279; *Lebovitz*, 669 F.2d at 901. *See also United States v. DeJohn*, 638

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[11] As to Petitioners' complaint that the District Court should have set forth its findings with the same level of specificity found in the Court of Appeals' decision, it need only be noted that district courts in the midst of trial cannot reasonably be required to produce written opinions on evidentiary disputes comparable to those produced by appellate courts, which have far more time for detached, analytical deliberations and which are also cognizant of the widespread impact their rulings will have on other courts. *See United States v. Foskey*, 636 F.2d 517, 525 (D.C. Cir. 1980) ("[t]he district court, required to make on-the-spot decisions, does not have the luxury of engaging in the type of careful balancing we have undertaken here . . ."); *Long*, 574 F.2d at 766 ("the dynamics of trial do not always permit a Rule 403 analysis in the detail the concurrence suggests as appropriate").

F.2d 1048, 1053 (7th Cir. 1981) ("where, as here, the balance so clearly favors admission of the testimony we will not presume that the evidence was admitted for the wrong reasons"); *United States v. Sangrey*, 586 F.2d 1312, 1315 (9th Cir. 1978) (Rule 403 is sufficiently satisfied where the issue of prejudice was specifically addressed in a motion *in limine*, the trial judge was aware of the requirements of the rule, and the judge explicitly rejected opposing counsel's arguments).

The procedures affecting Petitioners' Rule 703 contention are equally settled in the lower courts and were equally adhered to in the present case. With respect to this rule, Petitioners again make broad, unsupported claims that lower courts are failing to follow proper procedures in implementing Rule 703 and that drastic action is needed by this Court to rectify the situation. Pet. at 12-13. And again, they offer no case support for their claims.[12]

Under the established procedures governing Rule 703, a party offering expert testimony based on inadmissible evidence has the burden of demonstrating to the trial judge that the evidence is "of a type reasonably relied upon by experts in the particular field in forming opinions

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[12] The only case cited by Petitioners to demonstrate the allegedly widespread problems in administering Rule 703 is the case of *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666 (D.C. Cir. 1977). Even this case does not support Petitioners' claims of abuse. The trial judge in *Merit Motors* was not presented with any Rule 703 issue. Instead, the judge was faced with determining the proper application of Fed. R. Civ. P. 56 in order to resolve cross-motions for summary judgment. Rule 703 was raised on appeal only by analogy as purported support for appellant's claim that an expert witness could base his testimony on speculative and unsubstantiated theories. 569 F.2d at 672-73. The case provides no support whatsoever for Petitioners' contention that the D.C. Circuit "possesses perhaps a grudging view of Rule 703 and refrains from holding the trial judge to the requirements of the Rule." Pet. at 12.

or inferences upon the subject." [13] When such evidence is presented, generally by affidavit or during the *voir dire* examination of an expert witness, the trial judge has some basis for determining whether the evidence is in fact of a type reasonably relied upon by experts. *See In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 277 (3d Cir. 1983); 3 *Weinstein, supra*, ¶ 703[03], at 703-23. The recommended practice is for the trial judge to conduct such an inquiry outside the presence of the jury. *Id.* at 703-16.

Here, it is undisputed that Petitioners never offered *any evidence whatsoever* to demonstrate that experts reasonably and ordinarily rely on documents such as those proffered by Petitioners. Indeed, the best that Petitioners can now claim on this subject is that "[b]eyond question, a powerful argument *could have been presented* here supporting the fact that the documents" meet Rule 703's requirements. Pet. at 10 (emphasis supplied). But no such argument—or evidence supporting the argument—was ever presented to the District Court. Accordingly, Petitioners did not meet their burden of showing that the testimony was admissible.[14]

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[13] This issue comes before the trial court as a preliminary question governed by Fed. R. Evid. 104(b). Rule 104(b) "plainly contemplates that the moving party bears the burden of introducing such supporting evidence." *United States v. Cummiskey*, 728 F.2d 200, 206 (3d Cir. 1984). *See also* 21 C. Wright & K. Graham, *Federal Practice and Procedure* § 5053, at 262 (1977).

[14] Moreover, as the Court of Appeals found, even though the District Court determined during hearings on the motions *in limine* that Petitioners had not yet shown Dr. Kirk's testimony to be admissible, the trial judge nevertheless "made clear that the scope of Dr. Kirk's testimony was still open to reconsideration when Dr. Kirk was examined on *voir dire*." Pet. App. at A-17. While Petitioners now question whether the District Court did clearly leave the matter open (Pet. at 5, 10), they do not and cannot question that *they* raised the issue of admissibility during the hearings on the *in limine* motions, that they had not then, or at any other time, met their burden on the issue, and that the District Court certainly never stated that it would not receive evidence on the issue.

In summary, the well-settled procedures governing Rules 403 and 703 were fairly applied in this case. As next discussed, Petitioners' proposed *new* procedures for those rules do not merit this Court's consideration.

2. Petitioners' Proposed New Procedures For Rules 403 and 703 Are Impractical, Unnecessary and Contrary To Efficient Judicial Administration.

The purposes of Rule 403 are to ensure that evidence is excluded where its unfairly prejudicial effects outweigh its probative value and to give the proponent of the evidence fair notice of the reasons for the exclusion. The settled procedures described above fully meet those purposes.

Petitioners' proposal—that reversal must follow even where it is clear that the evidence was properly excluded and even where the proponent did not request more detailed findings—would flood the lower courts with appeals seeking automatic reversal whenever *any* evidentiary ruling was not accompanied by explicit, detailed findings by the trial judge.[15] The threat of such automatic reversals would also disrupt trial proceedings by effectively forcing trial judges repeatedly to halt the flow of proceedings so that such findings could be placed on the record to support each of the numerous evidentiary rulings typically made during trial. This would be a wasteful, unnecessary burden to place upon district courts[16]

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[15] Petitioners have offered no rationale which would justify limiting this new requirement to evidentiary rulings made pursuant to Rule 403.

[16] Appellate courts do not and should not require trial judges to set forth "a mechanical recitation of Rule 403's formula on the record . . . ." *Sangrey*, 586 F.2d at 1315. *See also United States v. Sliker*, 751 F.2d 477, 487 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 1772 (1985) (it is sufficient that the "issues of both the probative value and possible prejudicial effect of admitting this evidence were presented to the judge when he made the decision to admit it").

and a needless limitation upon the authority of courts of appeals.[17] It does not deserve this Court's serious consideration.

Neither is Petitioners' proposal regarding Rule 703 worthy of further review. To correct the alleged, but unidentified, misadministration of this rule, Petitioners propose that the burden be placed on district courts themselves to show whether the facts or data in question are of a type reasonably relied upon by experts. Hence, where, as in the proceeding below, the proponent of the expert testimony makes no attempt to demonstrate that the Rule 703 requirements are met, Petitioners apparently would require trial judges *sua sponte* to initiate a factual inquiry and develop evidence which affirmatively shows that the data or facts in question are *not* of a type reasonably relied upon; otherwise, Petitioners' proposal apparently would permit the expert to rely on such facts or data.[18]

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[17] It is well settled that appellate courts are authorized to examine the trial record to determine if there are grounds to support a judgment even where, unlike here, a district court has failed to consider those grounds or, indeed, has relied on erroneous grounds for its decision. *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 n.7 (1984); *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970); *J. E. Riley Investment Co. v. Commissioner*, 311 U.S. 55, 59 (1940). Indeed, this Court on occasion either has *directed* courts of appeals to examine the trial record in depth or has itself undertaken such reviews of the record. *See, e.g., Jaffke v. Dunham*, 352 U.S. 280, 281 (1957); *Brown v. Allen*, 344 U.S. 443, 458-59 (1953).

[18] Although Petitioners' argument in this regard is not completely clear, this conclusion seems implicit in their assertion that Rule 703 "requires" a factual inquiry by a district court. Pet. at 10, 11. If, instead, Petitioners do not propose shifting the burden of proof away from the proponent of the evidence, then it is difficult to understand what Petitioners do propose in this case. If the burden remains with the proponent of the evidence, then where, as here, the proponent offers *no* evidence to meet that burden, there is no

Petitioners offer no justification for such a revision to Rule 703. Under that rule—as with other evidentiary rules—it is the proponent's burden to demonstrate the admissibility of its own evidence. In most situations under Rule 703, the proffered expert himself is capable of demonstrating on *voir dire* how and why experts in his field typically rely on such evidence. Where the expert is unable to make that demonstration, the proponent is in the best position to seek affidavits or other evidence to support the reasonableness of such reliance. By contrast, it would be unreasonable and unwarranted to expect a trial judge to marshall such evidence *sua sponte* whenever, during the course of a trial, it became apparent that the proponent would not or could not offer such evidence. Such a burden would unreasonably tax the resources of the court and would threaten severe disruption to ongoing trials.[19] There is no justification for or need to adopt any such change to the well-settled procedures for administering Rule 703.

3. Petitioners' Contentions Are Not Appropriate For Review In This Case.

Finally, even if Petitioners' contentions otherwise warranted this Court's review, these contentions are not appropriately presented by this case for two important reasons. First, Petitioners failed to present their contentions to either the District Court or the Court of Appeals in this case; this failure not only prevented the prompt and proper resolution of these issues, but it also precludes this Court from receiving the benefits of the lower courts' con-

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factual dispute requiring any inquiry by the district court. In such situations, as below, the judge should simply rule that the evidence cannot be relied upon by the expert.

[19] Moreover, as with Petitioners' suggestions for Rule 403, there is no apparent reason why the trial judge's new obligations to conduct factual inquiries demonstrating admissibility should be limited to Rule 703.

sideration of the issues. To allow Petitioners to raise these issues at this late stage would send a signal that, whether for tactical reasons or otherwise, parties may avoid bringing such evidentiary objections to a district court's attention and press them for the first time on appeal in order to gain automatic reversal of adverse judgments. This Court should not entertain these issues in such circumstances. *See Grolier, Inc.*, 462 U.S. at 23 n.6; *Lovasco*, 431 U.S. at 788 n.7.

Second, it appears that any opinion by the Court on the issues presented would be advisory only, inasmuch as these issues are highly unlikely to affect the outcome of this case. Regarding Rule 403, Petitioners do not challenge the correctness of the Court of Appeals' findings that the exhibits in question were inadmissible because the risk of unfair prejudice, undue delay and jury confusion substantially outweighed whatever probative value the exhibits might be said to have. In such circumstances, a remand to the District Court would be pointless; that court would surely do no more than repeat the factors which the Court of Appeals has already indicated warrant exclusion under Rule 403. Moreover, it is questionable whether the Court of Appeals would or should remand for such findings at all in this case; that court might well affirm the District Court's exclusion of the exhibits on hearsay grounds and/or because the subject matter of the exhibits was not shown to be sufficiently similar to the defect alleged in the present case.

Similarly, granting Petitioners' request to shift the burden of proof in Rule 703 determinations would also not alter the outcome of this case. This is so for several reasons. First, even if the District Court had an affirmative obligation to conduct its own factual inquiry under Rule 703, that court would at the least require Petitioners' expert to appear for such an inquiry; yet it is not at all apparent that Petitioners' expert is prepared to par-

ticipate further.[20] Second, and more importantly, the record leaves in doubt (as the Court of Appeals noted) whether the expert's failure to appear at trial was in fact the result of the District Court's Rule 703 determination. Pet. App. at A-5 n.3.

Finally, and perhaps most significantly, even if Rule 703 was improperly applied by the District Court, it is clear that that application was harmless. As previously stated, during the pretrial phase of the action below, Petitioners were required by Fed. R. Civ. P. 26(b)(4) and 26(e)(1)(B), as well as the pretrial order entered by the District Court, to identify the specific substance of Dr. Kirk's testimony prior to trial. As the District Court later found, however, Petitioners failed to comply with these requirements. As a result, the District Court ruled that the substance of Dr. Kirk's testimony would be limited to that set forth in his deposition and a report previously submitted by him, neither of which offered any opinions or conclusions which relied on the exhibits in question.[21] Petitioners understandably have not challenged on appeal the soundness of this decision by the District Court. Thus, even if Dr. Kirk's testimony were held *admissible* under Rule 703, the testimony would still be *inadmissible* due to Petitioners' failure to comply with the court's pretrial order and the Federal Rules of Civil Procedure.

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[20] According to Petitioners' counsel, Dr. Kirk apparently had become reluctant to testify at trial. Pet. App. at A-5 n.3.

[21] This decision by the District Court did not unduly restrict the scope of Dr. Kirk's testimony. As the Court of Appeals noted, Dr. Kirk had formed his opinions concerning the defect in this case prior to any review of, or reliance upon, the exhibits in question, and Petitioners themselves had indicated that Dr. Kirk's testimony would be based on videotapes, photos, and depositions of other witnesses, and not simply based on the exhibits in question. Pet. App. at A-5 n.3.

CONCLUSION

At bottom, this is a straightforward diversity action in which Petitioners simply disagree with the factual assessments made by the courts below in excluding certain evidence. Having no basis for attacking either the factual assessments or the exclusion of the evidence, Petitioners now claim that new procedures are needed for administration of the applicable rules of evidence. Petitioners' proposed new procedures, allegedly needed to correct widespread misapplication of Rules 403 and 703 by unidentified lower courts, would impose impractical, unnecessary, and burdensome requirements on the lower courts. Furthermore, Petitioners' proposed procedures were not appropriately raised below and even if adopted would not affect the outcome in this case. The Petition for a Writ of Certiorari should therefore be denied.

Respectfully submitted,

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